No. 240.

Brief on Motion

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1898.

Filed Aug 20, 1898.

STANTON WARBURTON,
Plaintiff in Error,
vs.
ELLEN T. NELSON, MATILDA B. WHITE, AND AMELIA McDONALD,
Defendants in Error.

No. 240.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT ON BEHALF OF MATILDA B. WHITE, DEFENDANT IN ERROR, ON MOTION TO DISMISS WRIT OF ERROR; WHEREWITH IS UNITED A MOTION TO AFFIRM JUDGMENT.

CHARLES B. FOGG,
JAMES HAMILTON LEWIS,
Attorneys for the Motion.

SHEPARD & THE PRINTER, TACOMA.

STATEMENT OF THE CASE.

This action was commenced by plaintiff in error to quiet his alleged title to the property in controversey, acquired by sheriff's deed under an execution against E. G. Bacon.

The defendants in error, Ellen T. Nelson, Matilda B. White, and Amelia McDonald, filed a joint answer, putting in issue the averments of the complaint of plaintiff in error; and alleged, among other things, that they inherited from their mother, Sophia D. Bacon, an undivided one-half of the property in controversy; and prayed that their title thereto be quieted. Subsequently the defendant in error, Ellen T. Nelson conveyed her interest in the property to the plaintiff in error. And thereafter the defendants in error, Matilda B. White and Amelia McDonald, filed their amended answer in the case, putting in issue the averments of the complaint; and alleging that their mother, Sophia D. Bacon, died seized of the undivided one-half of the property in controversy; and that they inherited from said Sophia D. Bacon an undivided one-third of the property in controversy; and that prior to the commencement of this action the defendant in error, Amelia McDonald, conveyed all her interest in the property to the said Matilda B. White. And praying that her title to an undivided one-third of the property in controversy be quieted, etc.

The case was tried upon an agreed statement of facts, wherein it was agreed:

1. E. G. Bacon and Sophia D. Bacon were married in California and thereafter commenced to reside in Washington Territory in October, 1873.

2. In 1877 E. G. Bacon purchased with community funds acquired subsequent to and during his marriage with Sophia D. Bacon, the property in controversy herein; and immediately took up their residence on said property.

3. Sophia D. Bacon died intestate in July, 1880, leaving her surviving her husband, E. G. Bacon, and her three children Ellen T. Nelson, Matilda B. White and Amelia McDonald, defendants in error herein; the two last named being her children by a former marriage; and the first named being the daughter of Mr. and Mrs. Bacon.

4. In 1892, E. G. Bacon became indebted to plaintiff in error and thereafter, in April, 1895, plaintiff in error obtained judgment in the State Court against him and caused execution to be issued thereon and levied upon the lot in question; and in March, 1896, the lot was sold at sheriff's sale to the plaintiff in error.

5. During the pendency of this suit, and before the trial thereof, the plaintiff in error obtained a deed from Ellen T. Nelson, of all her right, title, and interest in and to the lot in question. The said E. G. Bacon having died prior thereto.

6. The defendant, Matilda B. White, prior to the commencement of this action, purchased all the interest of Amelia McDonald, defendant in error, in said lot.

The trial court adjudged and decreed that plaintiff in error was the owner of the undivided two-thirds, and that the defendant Matilda B. White was the owner of the undivided one third of the property in controversy; and made

findings of fact in harmony with the agreed statement of facts as above stated. And upon said facts made the following conclusions of law:

1. That the plaintiff is the owner of and entitled to a decree herein quieting his title to an undivided two-thirds of the property in controversy in this action.

2. That the defendant Matilda B. White is the owner of and entitled to a decree herein quieting her title to an undivided one-third of the property in controversy in this action, as prayed for in the amended and separate answer of the defendants Matilda B. White and Amelia McDonald filed herein.

Thereafter the plaintiff in error filed his objections to the Conclusion of Law that the defendant Matilda B. White was owner of an undivided one-third of the property in controversy, and entitled to a decree quieting the same in her, on the alleged ground of being in contravention of the provisions of Section 10, Article I and Article XIV of the Constitution of the United States. Said objection is more fully and at large set forth in the motion to dismiss herein.

Thereafter the case was by plaintiff in error appealed to the Supreme Court of the State of Washington, wherein the decision of the court below was affirmed; and a petition for rehearing, filed by plaintiff in error, was denied.

Application was then made to one of the Justices of this Court for writ of error herein. Whereupon both the plaintiff in error and defendant in error were permitted to appear and be heard by the Justice to whom the application was made upon the question as to whether the writ of error should be issued. And after argument and due consideration, the application for the writ of error was denied. Subsequently plaintiff in error made an *ex parte* application, without notice to defendant in error, to an-

other Justice of this court, for the issuance of said writ of error herein, which application was granted. And defendant in error now moves this court to dismiss the writ of error so granted herein upon the several grounds set out and stated in the motion to dismiss, filed herein.

I.

THERE IS NO QUESTION OF FEDERAL LAW IN THIS CASE, AND NO FEDERAL QUESTION WAS PRESENTED TO OR DECIDED BY THE SUPREME COURT OF THE STATE OF WASHINGTON.

Plaintiff in error obtained a sheriff's deed to the property in controversy in 1896. And thereupon he commenced this action to quiet the title alleged to have been acquired by virtue of said sheriff's deed. Subsequently he obtained a deed from the defendant in error, Ellen T. Nelson, for her interest in the property.

Upon the trial it was found and adjudged that plaintiff in error owned an undivided two-thirds and the defendant in error, Matilda B. White, owned an undivided one-third. This case involves no question of general law, but rests upon an alleged contract, not in the record, and upon acts of the territorial legislature, and the construction placed thereon for a period of more than fifteen years by the courts of last resort of the Territory and State of Washington.

Upon these undisputed facts it appears clear that no question of federal law is involved. But plaintiff in error asserts:

1. That in 1877 E. G. Bacon purchased, with community funds acquired subsequent to and during his marriage with Sophia D. Bacon, the property in controversy herein. And that Bacon and his wife immediately took up their residence upon said property.

2. That at the time of this purchase a certain act of the Territorial Legislature of the then Territory of Washington was in force, to-wit: The common or community property act of 1873 (which is a mere re-enactment of the common or community property act of 1869).

3. And also an act, was in force prescribing the rule of descent of community real estate, passed in 1875.

4. Plaintiff in error also contends that under and by virtue of the terms of the contract of purchase by Bacon and wife and of the said acts entering into and forming a part of said contract, E. G. Bacon became, *individually*, the owner in fee of the whole of said property under said contract of purchase; and that by said contract under the said laws his wife, Sophia D. Bacon, took no interest therein; and that plaintiff in error, by virtue of his sheriff's deed acquired and took all of E. G. Bacon's interest in the property.

5. Plaintiff in error further contends that, in 1879, the territorial legislature passed another community property act, whereby the act of 1875 prescribing the rule of descent of community property was repealed, and the common or community property act of 1873 was modified; and that such repeal and modification is unconstitutional.

II.

The answer of defendant in error, to these various contentions of plaintiff in error, is:

1. That the alleged contract, under which the property was purchased by Bacon and wife, in 1877, is not in the record; nor are any of its terms, conditions, or agreements anywhere stated therein.

2. That plaintiff in error was not a party to that contract.

3. That contrary to the contention of plaintiff in error, the act of 1873 vested the *ownership* of all community real estate in the HUSBAND AND WIFE, and not in the husband alone, as claimed by plaintiff in error.

4. That none of the contentions of plaintiff in error involved any question of federal law, and the decision of the Supreme Court of the State of Washington in this case rests solely upon non-federal questions, and no federal question was presented to, decided or involved, necessarily or otherwise, in the decision of this suit.

In re Robertson 15 Supreme Court Reporter 324.

Dibblee vs. Bellingham 16 Supreme Court Reporter 939

III.

THE CONTRACT DOES NOT APPEAR IN THE RECORD

The contract by which Bacon and wife became the owners of the property in controversy in 1877, the obligations of which plaintiff in error claims have been impaired, is not in the record; nor are any of its terms, conditions or obligations there stated.

The fact that this contract is not contained in the record must, we assume, be fatal to the contentions of plaintiff in error in this cause and court. The record in this case furnishes no light or information as what the contract was, its terms, or its conditions; or what were the obligations which plaintiff in error claims have been impaired in contravention of the provisions of Section 10, Article 1, and Article XIV, of the constitution of the United States.

It is believed to be without precedent for this court to be asked to decide that the obligations of a contract have been impaired contrary to constitutional provisions, with-

out the contract or a word, a letter, or a sentence of the contract alleged to have been impaired, being shown to or brought before your honors. It is not shown whether the alleged contract is in writing or rests in parol.

C. B. & Q. Ry. Co. vs. Nebraska, 18 Sup. Ct. Rep. 513-520.

IV.

THE CONSTITUTIONAL PROVISION INVOKED RELATES TO A STATE, NOT A TERRITORY.

The provisions of the constitution of the United States, the protection of which is claimed by plaintiff in error in this case, by their own terms relate to the acts of a sovereign state of the union, and have no application to the acts of a territorial legislature. And, inasmuch as all of the legislative acts complained of by plaintiff in error are acts of the territorial legislature of the territory of Washington, no further argument upon that point is necessary.

V.

PLAINTIFF IN ERROR IS NOT A PARTY TO THE ALLEGED CONTRACT.

Not only is the contract of purchase, supposed to have been made by Bacon in 1877, not in the record, but it is not even claimed by plaintiff in error that he was a party to that contract, or that he acquired his alleged interest in the property until seventeen years after the alleged contract was made.

The rule in this behalf appears to be fully stated in Del. Castillo vs. McConnico, 18 U. S. 229. The claim that

a state statute is void, because, it deprives one of property without due process of law, is limited solely to an inquiry whether, UPON THE RECORD PRESENTED BY THE PLAINTIFF IN ERROR, the statute appears to have operated to deprive HIM of HIS PROPERTY OR PROPERTY RIGHTS without due process of law. This is the sole question before the court on this record.

A stranger to the contract cannot object that it has been impaired. Wellington vs. Petitioners, 16 Pick. 87; Cooley on Const. Lim. 181.

Plaintiff's rights in this property, if any, arise from and were acquired by his purchase at execution sale under his judgment against E. G. Bacon. This was about seventeen years after the passage of the act complained of. The debt for which judgment was rendered did not exist until about thirteen years after this statute was enacted. What contract of the plaintiff in error was thereby impaired? Of what property has that act "deprived" him?

But it is said that the act of 1879 impaired the obligation of E. G. Bacon's contract, and deprived E. G. Bacon of HIS property, without due process of law. What has this plaintiff in error to do with that, even if it were a fact? Shall he be treated as a knight errant, going about righting the wrongs of others?

But it is claimed that plaintiff in error became a creditor of Bacon some thirteen years afterwards, and a purchaser at execution sale seventeen years after the passage of the act. Can a *subsequent* creditor, after obtaining judgment upon his claim and levying execution upon the property of his debtor, and bidding it in at sheriff's sale, legally assume the right to step into his debtor's shoes and raise an objection that a statute passed seventeen years prior to his purchase impaired the title of the judgment debtor to the property purchased at execution

sale, or that it had seventeen years before that purchase deprived the execution debtor of some property right? If he were a *prior* creditor, that is, had he been a creditor of Bacon at the time of the passage of the act, his claim might perhaps be entitled to more consideration.

Secondly, plaintiff in error is a mere purchaser at an execution sale—a sale made *in invitum* where the rule of CAVEAT EMPTOR applies. Thirdly, had it been soon after the act was passed instead of nearly twice the period required to bar an action for the recovery of real estate under the laws of this state, the claim to consideration might appeal with more force to the judicial mind. Fourthly, had it been shown that Bacon was himself now making this claim in his own behalf, there would be more reason to support it; but no such showing is made, and the burden is on plaintiff in error to show that Bacon did not assent and acquiesce. Under any circumstances can a statute be said to impair the obligations of a contract that had no existence, until years after the statute claimed to impair it went into effect?

Since it does not appear that any contract of the plaintiff in error has been impaired, and since the plaintiff has not been "deprived" of any property without due process of law, does it lie in him in this action to put this court upon inquiry whether the obligation of the contract of some one else has been impaired, or whether some other person has not been, in some past time, deprived of his or her property without due process of law?

If a third party—a volunteer, can by thus acquiring the interest of a husband in community property, or of the wife, or of some of the heirs of either of them seventeen years after the passage of a certain act, and during all which time all the parties in interest had acquiesced in it, and then go into court and successfully assert that an

alleged constitutional right of one of those whose interests he has so acquired has been impaired or diminished in order that he may thus deprive wife, husband or children of their property, heirship or estate—it is but the converting a solemn constitutional guarantee of the sacredness and inviolability of private contracts—a shield and protection against spoliation—into a mere device and opportunity for oppression and improverishment of the blameless. Here is seen the heir of the spouse who is alleged to have become the sole owner, believing that she inherited only a moiety of the property, making a quit claim deed of her interest for the supposed value of such share, when, lo! and behold! the purchaser immediately institutes suit against her half sisters to deprive them of their heritage, alleging that by such quit claim deed he acquired the entire property.

There is another view of this case that is deserving of consideration: To sustain such a proceeding on the part of a stranger—a volunteer where the parties have acquiesced so long in the *status quo*, is to encourage litigation of stale cases, that on the part of the purchaser has all the objectionable features of a champertous bargain—one that partakes of the nature of a champertous proceeding, and especially so as to any right acquired under the quit claim deed of Mrs. Nelson to the plaintiff in error.

In Graham vs. Ry. Co. 12 Otto, 148, it is said: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."

VI.

CONSTRUCTION OF THE STATE COURT.

Plaintiff in error contends that the Supreme Court of

the State of Washington has placed an erroneous construction upon the provisions of the community act of 1873. But we understand the rule in this respect to be that in cases depending upon the constitution or statutes of a state, the federal courts will adopt the construction of the contitution or statute given by the highest court of the state.

Central Land Company of W. Virginia vs. Ladley, 159 U. S. 103.

Hanford vs. Davies, ibid. 163 U. S. 273.

St. Joseph & G. T. R. Co. vs. Steel, 167 U. S. 659.

Willis vs. Board, 86 Fed. R. 872.

Federal courts follow the decisions of state courts, in their construction of their own statutes and constitutions. Cooley on Const. Lim. 13, and cases there cited.

VII.

JURISDICTION OF FEDERAL SUPREME COURT.

Plaintiff in error was too late in setting up his claim to protection of the Constitution of the United States. The claim in that behalf should have been made prior to the decision of the case by the trial court. The claim was neither made nor set up in the bill of complaint.

City Ry. Co. vs. Citizens Street Ry. Co., 166 U. S. 557.

Zadig vs. Baldwin, 17 U. S. 639.

This claim was first made, by an exception to the conclusions of law made by the trial court, subsequent to and in conformity with the decision of the case by the court. It is true that a paper writing was filed with the clerk during the progress of the trial, which by plaintiff in error is claimed to raise this constitutional question, but as said

paper writing has not been brought into the record by bill of exceptions or otherwise, it cannot be considered as a part of the record of this case.

VIII.

WRIT OF ERROR.

Plaintiff in error applied to one of the Justices of this court for a writ of error herein. Whereupon defendant in error, by her counsel, appeared and objected to the issuance of the writ. The matter was fully argued upon its merits by plaintiff in error, and by counsel for defendant in error, and the matter was then and there submitted for decision by both parties. Thereupon the Justice to whom the application was made and before whom the hearing and argument was had, adjudged and decided that the plaintiff in error was not entitled to the writ and therefore denied the same. Did not this amount to an adjudication? Was not the matter of allowance of the writ of error then *res adjudicata*? What authority had another Justice to thereafter direct the issuance of the writ? It certainly cannot be intended to be the rule and practice of this court to permit a party to first apply to one Justice for a writ of error, and, after hearing and full argument, on the part of both parties, and after a denial of the writ upon such hearing, to then apply, EX PARTE, for the writ to a second Justice; since, if that were the custom, a party seeking the writ may successively apply to each Justice of this court for writ of error and be denied, until he shall have so applied to and been denied by each of the Justices except one, and then finally obtain the writ. It seems that the unwisdom of such a method of procedure is apparent; and that a writ of error obtained under these circumstances ought for that reason alone to be dismissed.

IX.

THE ACT RELATING TO THE RULE OF DESCENT PASSED IN 1875.

The title of the act of 1875, referred to, is as follows: "AN ACT TO REGULATE THE DESCENT OF REAL ESTATE and the distribution of personal property." Section 2 of this act is as follows:

"Sec. 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempting property from attachment and execution, and specially the provision securing the homestead to the survivor, and all property except (exempt) as an allowance for support of the family."

This act of 1875, so far as section 2 above quoted is concerned, was repealed by section 12 of the community act of 1879. Section 12 of said act being as follows:

"Sec. 12. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts."

Sophia D. Bacon died in 1880, subsequent to the enactment and taking effect of the community act of 1869. Plaintiff in error now raises the contention that, under the act of 1875, (which was confessedly, so far as real estate is concerned, an act relating to DESCENT only), it was not competent for the legislature of Washington to alter, change, or repeal that act so as to affect the descent of property acquired while that act was in force. That the act of 1875, is, so far as real estate is concerned, one that

relates to DESCENT ONLY, conclusively appears from the title to the act.

There is a provision in the organic act of the Territory of Washington which reads as follows:

"Every law shall embrace but one subject and that shall be expressed in the title."

Revised Stat. of U. S. Sec. 1924; Richards vs. Bellingham Bay Co. 4 U. S. C. C. A., 290.

The act of 1875 is one relating to descent only so far as it relates to real estate. If more is claimed for it, then that part of the act upon which such claim is predicated is invalid for the reason that the subject of the act has not been expressed in the title.

Assuming that the act is one that relates to descent only, we assert with full confidence that the survivor, heir, or person upon whom the descent is cast by this law, acquired thereby no VESTED RIGHT in property of the ancestor prior to his death. That has been everywhere and always so held. Therefore it was competent for the legislature, at any time, to repeal, change or alter the law relative to descent, either before or after the acquisition of property; and the law and rule of descent in force at the time of the death of the ancestor must govern. This question has been before the supreme court of the state of Washington, and its decisions have followed the universal rule respecting the construction given to acts relating to descent of real estate and of the right of the legislature to repeal or modify such acts at any time prior to the death of an ancestor. The following cases support this rule:

Mabie vs. Whittaker, 10 Wash. 656, supra.

Pearsall vs. Great Nor. Ry. Co. 161 U. S. 646.

Cooley on Const. Law, 332.

Warburton vs. White et al, 52 Pac. 532.

3 Ency. of Law 751.
Randall vs. Krieger, 23 Wall. 137.
McNeer vs. McNeer, 32 N. E. Rep. 681.
Percy vs. Cockrill, 4 C. C. A. 73.
Hughes vs. Murdock, 13 Southern Rep. 182.
Wellington vs. Petitioners, 16 Pick. 87.
Nelson vs. Kilgore, 140 U. S. 487.
Cooley on Const. Lim. 181-182 and cases cited.

X.

HUSBAND AND WIFE EQUAL OWNERS OF COMMUNITY REAL ESTATE, (AND HEREIN THERE IS NO FEDERAL QUESTION).

Appellant's principal contention, as already stated, is that under the contract of purchase made by Bacon in 1877, while this common or community property act of 1873 was in force, E. G. Bacon became and was the sole owner, in fee simple, of the WHOLE of the property in controversy; and that his wife, Sophia D. Bacon, had no right, title, or interest therein. Inasmuch as the contention of plaintiff in error in this behalf has been heretofore repeatedly passed upon and decided by the supreme court of the State of Washington, adversely to his contention, the first of said decisions having been rendered more than fifteen years ago, and thereby a rule of property has been established and uniformily followed by the courts of that state, do not now deem it necessary or proper to enter into a general discussion of the questions so settled by those decisions. The following are a part of the decisions referred to:

In 1882, in the case of Holyoke vs. Jackson, 3 Wash.

Ter., 235, the Supreme Court of Washington decided: "In it (the community) the proprietary interests of husband and wife are equal. * * * By virtue of the statute, this husband and wife creature acquires property. * * * . To somebody it must go in case of death or divorce. * * * That the like absolute power of disposition as of his own separate estate, bestowed by the 9th section of the act of 1873, was a MERE TRUST conferred upon him as a member and head of the community, IN TRUST FOR the community, and not a proprietary right. It was perfectly competent FOR THE LEGISLATURE OF 1879 TO TAKE IT FROM HIM AND ASSIGN IT TO HIMSELF AND HIS WIFE CONJOINTLY. That was done. When, therefore, in 1880 the plaintiff, without his wife, entered into an agreement to sell the land in question, he agreed to do what he himself by himself, could not do, and therefore could not agree to do. To make an actual sale or conveyance without his wife he had no power. The law says such a thing shall not be done. An agreement proposing it is in conflict with the law and void.

"Community property was created by the statute of December 2, 1869. Although called common property by that statute and by the statute of 1873, by the statute of 1879 it was first denominated community property. The rights referred to in the 31st section of the act of 1879 are proprietary rights and not such naked power of management, control or disposition as are devolved upon any married persons to be exercised in trust for the community. Therefore, all the provisions of the act of 1879 which operate to create, vary or assign powers of that description, are applicable to the property previously acquired. By the statute of 1879, section 8, the husband is clothed with a certain trust in respect to community real property.

The management and control of it is vested in him, not for himself but for the community. Besides this, he, with the wife, is endowed with power to dispose of it. This power, too, is in trust for the community. For we must distinguish the community called into existence by the statute from the two individuals who compose it. By a like distinction, a corporation is conceived to differ from its stockholders. When the husband, therefore, thus situated, undertakes to dispose of the community property as his own, he stands differently from the absolute proprietor of a homestead, who has the power to shift the domicile of his family at pleasure, and who is required to have his wife join, not because she is joint trustee with him, nor because he without her is not owner, but merely as a check on his power of disposition, lest certain consequences follow, injurious to the proper policy of the state. In the matter of disposing of community property, husband and wife are, by the law of 1879, joint trustees for their mutual benefit in the community. Within the scope of the joint trust, neither can act without the other."

This case makes plain the fact that under the common property act of 1873 the HUSBAND AND WIFE were the OWNERS of common or community property, and not the husband alone, as now contended for by plaintiff in error.

Under the act of 1873 an agency was conferred upon the husband and he was by law made an agent of the community for a specific purpose and thereby as a member and head of the community given the power to sell and convey community real estate IN TRUST for the community. This POWER TO CONVEY, so given the husband, in no wise concerned or affected the EQUAL OWNERSHIP of the husband and wife in the common or community property.

During the last fifteen years, this case of Holyoke vs. Jackson has been repeatedly cited and followed in every court in the territory and state, as bear witness the numerous cases decided in those courts in which the case of Holyoke vs. Jackson is cited, approved and followed.

In 1893 the supreme court of that state again had occasion to consider the precise questions involved in this case, and in Hill vs. Young, 7 Wash. 33, that court said:

"The land in controversy was acquired in 1871, being conveyed to the husband by deed of purchase. The act of 1869, 'defining the rights of husband and wife,' declared that property acquired by either husband or wife, except that acquired by gift, bequest, devise, or descent, should be 'common property,' Sec. 2. It also provided that the husband should have the same absolute power of disposal of the common property as he had of his separate estate, Sec. 9. Respondents maintain that this power to dispose was a vested right in the husband, which could not be taken away by any subsequent statute. But it is not necessary to decide this point; the act of 1869 having declared certain property 'common property,' did not make provision for the disposal of such property upon THE DEATH OF EITHER SPOUSE, as was done by later laws on the same subject; but we think that without anything further than was contained in that act courts of the territory would have been bound to administer upon such property, after the death of husband or wife, according to the established rules of those states and countries where common or community laws had existed. The first and cardinal of such rules was THAT THE COMMUNITY WAS DISSOLVED by the DEATH OF EITHER SPOUSE; next, THE RIGHT OF DISPOSAL IN EITHER SPOUSE WAS ENDED; and, third, THE PROPERTY BECAME VESTED BY MOIETIES IN THE SURVIVING SPOUSE AND THE CHILDREN. Therefore, upon the death of Mrs. Hill, in 1883, EVEN IF THE ACT OF

1869 WAS THE ONLY LAW APPLICABLE TO THIS LAND, the RIGHT of the HUSBAND to DISPOSE of the whole estate terminated. And it may be further stated that the purchaser in this instance knew of the marriage relation which existed between his grantor and Mrs. Hill, and knew, also, that appellant was their only child."

Again, in 1895, the supreme court of the state of Washington had occasion to re-examine and consider practically every question that is raised upon the record in the case at bar, and therein decided each of these questions adversely and contrary to the contention of appellant in this case. I refer to the case of Mabie vs Whittaker, 10 Wash. 656, in which case the briefs and argument before the court were exceedingly full and ample, and the decision itself bears evidence upon its face that the subject matters under consideration received the careful, deliberate and exhaustive consideration of the court. In that case, among other things, the court said:

"Real property acquired by the community under the provisions of the law of 1869, which gave the husband power to convey the entire title by his separate deed, could not be conveyed away by the husband after his wife's death, so as to pass her interest, while the law of 1871 (Laws p 73 §22), declaring that one-half the community property should belong to the wife and her heirs forever, was in force.

"The deed from Tilley and wife to Andrew Mabie was executed while the statutes of 1869, relative to common property were in force, and the land became the common property of Mabie and wife thereunder, Section 9 of this act (Laws 1869, p 320, Abb. Real Stat. p 472), empowered the husband to convey the entire title to such land by his separate deed, but subsequently the legislature passed another act (Laws 1871 p 70, Abb. Real Prop. Stat. 476), which was in force at the time Mrs. Mabie died in 1872, and §12 of the act reads as follows:

"The husband shall have the management of all the common property, but shall have no right to sell or en-

cumber real estate except he shall be joined in the sale or encumbrance by the wife; but he may sell or encumber any personal common property without being joined by the wife.'

"One of the contentions of the respondents is that whatever the nature of the wife's interest in the land was, the right of Mabie to convey the entire title could not be taken away by legislation subsequent to the time it was acquired by him. But leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title under the former law after her death and cut off her heirs, WE THINK THE SUBSEQUENT ACT TOOK AWAY HIS POWER TO DO SO. It was immaterial whether the record title to the community lands stood in the name of the husband or of the wife, or of them both, when considered with reference to the power of the legislature to authorize either or both of them to convey. The legislature could as well have provided that the wife could convey as the husband, and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make interest of either spouse in community lands greater or less.

"Furthermore, prior to the conveyance to Hallett, the commnnity in question had been dissolved by the death of the wife, and at the TIME of her DEATH the LAW of *1871*, relating to the DESCENT of community property, WAS IN FORCE. Section 22 p 73 (Abb. Real Prop. Stat. p 478) provided that: 'The common property being partnership property, the wife's share shall be one-half thereof and shall be hers and her heirs forever; and her share of the common property may be increased so as to be more than one-half, by the wife's compliance with the provisions of section five of this act.'

"The statute of 1871 did not undertake to divest any right which had become vested. Mabie receiving this conveyance under the act of 1869 thereby became the owner of an undivided one-half interest in the land, and

his wife thereby became the owner of the other half. HER RIGHT WAS AS MUCH A VESTED RIGHT AS HIS. Upon the weight of authority THE LEGISLATURE HAD POWER TO CHANGE THE LAW OF DESCENT and could take away the right of survivorship as to estates in joint tenancy, and make the same applicable to lands already acquired. Cooley on Const. Lim. (5th ed.) 440-41. Freeman, Co-tenancy and Part. §36 and cases cited by each; also Miller vs. Dennett, 6 N. H. 190. Section 22 aforesaid is substantially a statute of descent. It has the technical and apt words of such a statute: 'Hers and her heirs forever,' which indicates the legislative intent. There was also a general statute of descent in force which could more logically be applied to community estates than could the doctrine of joint tenancy. Laws 1862, p 261, Abb. Real Prop. Stat. 375-378.

"Subsequently another act was passed to regulate the descent of real property. Laws 1875, p 55 Sec. 2 provided: 'Upon the death of husband and wife, the whole of the community property, subject to the community debts, shall go to the survivor.' This statute continued in force until November, 1879, when an act was passed (Laws 1879 p 77) §13 of which was as follows:

" 'In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall pass to the survivor subject to the community debts and to the exclusion of collateral heirs, the family allowance and the charges and expenses of administration.'

"In neither of these acts were community lands referred to as being held in joint tenancy, and the only reference of the kind thereto is contained in the act aforesaid, passed in 1885, subsequent to all of them.

"We cannot overturn the statutes, nor the settled law of the state to meet the hardships of a particular case, much as we would like to avert them. If Andrew Mabie

could not convey this land during the life time of his wife, he could convey nothing more than his interest therein after her death. UPON HER DEATH HER INTEREST IN THESE LANDS VESTED IN HER HEIRS."

In the case at bar the supreme court of the state of Washington decided as follows:

"The question to be determined in this case is whether the husband succeeds to all the property which was purchased by himself and wife with community funds in this state (then a territory) in 1878, or whether one-half of said property descends to the heirs of the wife. It is contended by the appellant that the property descends to the husband by right of survivorship under the laws of 1873 and 1875, and a very painstaking and exhaustive brief has been filed in support of this contention. As an original proposition the brief and argument of appellant would be exceedingly interesting, but the uniform holding of this court for the last fifteen years has been to the contrary. This question was first decided adversely to appellant's contention in Holyoke vs. Jackson, 3 Wash. Ter. 235, in the year 1882. The same question has been expressly decided by this court in Hill vs. Young, 7 Wash. 33, and Mabie vs. Whittaker, 10 Wash. 656, AND INCIDENTALLY DECIDED IN PROBABLY FORTY OTHER CASES, so that the rule announced by these cases has BECOME THE ESTABLISHED RULE OF LAW AND OF PROPERTY in this state. RIGHTS HAVE BEEN ESTABLISHED AND HAVE GROWN UP UNDER THESE DECISIONS WHICH IT WOULD BE WRONG NOW TO DISTURB, even if the court should conclude that the rule as originally announced was faulty. In consideration of this long settled and well established doctrine we do not feel called upon to enter into a discussion of the questions involved. The judgment will be affirmed."

Upon the petition for re-hearing in the case at bar, the Supreme Court of the State of Washington decided:

"This cause is before us on a petition for a re-hearing,

appellant asking a further consideration of the question before urged by him in his brief and on the oral argument, that, the right of survivorship granted under the law of 1875, and the rights urged under the law of 1873 were vested, proprietary and contractual rights, and that, therefore, later acts of the legislature could not deprive appellant of them on the ground that it would impair the obligation of the contract by which the property was obtained, and thus be in conflict with the constitution of the United States. If any of these questions are presented by the record it is sufficient to say that the court was and is of the opinion that section 2 of the act, Laws 1875, p 53, was never in force to the extent of conferring a vested right of survivorship in favor of either spouse as to community property. As such it would have been void AS NOT BEING EMBRACED IN THE TITLE OF THE ACT, and at most it could only be construed as A STATUTE REGULATING THE DESCENT OF PROPERTY, AND IT WAS WITHIN THE POWER OF THE LEGISLATURE TO CHANGE IT, WHICH WAS THEREAFTER DONE. We were of the opinion also that even though it conferred a right to property by survivorship it could be taken away, and was by subsequent legislation, and that under the laws of 1873 no vested rights were conferred upon the husband as claimed, but that the same were within the power of the legislature to change thereafter as was done. Rights, such as are claimed by this appellant never were recognized or enforced here either during territorial days or since under either of said acts; but the uniform holdings have been to the contrary as stated in the former opinion. The petition is denied."

It will thus be seen that the principal contention of plaintiff in error was decided adversely to his contention more than fifteen years ago, and that the construction then placed upon the community acts of 1869 and 1873 and the act relating to descent passed in 1875, have been uniformly followed by the supreme court of the territory and

state of Washington, and that a rule of property thereby has been necessarily established.

In view of these facts and these decisions, it is not now deemed necessary or proper to enter into a general discussion of the questions settled by those decisions. If anything on earth can be said to be settled, it is the settled law of the state of Washington that, under the community act of 1873, the husband and wife each acquired an undivided one-half interest in their community real estate; and that the act of 1875 was an act merely relating to the descent of real property. Hence it follows that E. G. Bacon and his wife Sophia D. Bacon, in 1877, became the equal common or community owners of the property in controversy, and not E. G. Bacon alone, as is contended for by plaintiff in error; and that, upon the death of Mrs. Bacon, in 1880, her half of the community property descended to her heirs at law, the defendants in error herein.

XI.

NO JURISDICTION

From the whole record here presented it is submitted that this court has no jurisdiction in the case; and that the writ of error herein ought not to have been issued; that there is no question of federal law in the record of this case.

XII.

MOTION TO AFFIRM

With our motion to dismiss the writ of error, we have united a motion to affirm the judgement in this case, for the reason:

1. That although the record may show that this court has jurisdiction, it is manifest that the writ of error was taken for delay only.

2. That the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

3. That in so far as plaintiff in error makes claim under his deed from the defendant in error, Ellen T. Nelson, the claim and the prosecution thereof is champertous.

As to the first two grounds of this motion to affirm, we need only to refer to the facts as disclosed by the record in this case. There it appears manifest that the suing out of the writ of error herein is wholly without merit, and could have been taken only for delay, since there could have been no reasonable expectation, on the part of plaintiff in error, of obtaining any relief in this court. That if there be any question, on which jurisdiction of court depends in this case, it is too frivolous to need futher argument to make it apparent.

4. As further grounds for affirmance it may be stated that the claim of plaintiff in error is a champertous one. One source of his title is the deed from defendant in error, Ellen T. Nelson, executed during the pendency of this suit and after the death of her father, E. G. Bacon, and purporting to convey her interest in this lot. This deed it will be seen was procured after issue joined in this action, and after Ellen T. Nelson had verified the joint answer of herself and her two half sisters, defendants in error, in which it was expressly alleged that they, the three defendants, inherited one half of the property as children and heirs of Sophia D. Bacon, deceased. From this sworn answer it conclusively appears that plaintiff's grantor never claimed that one third inter-

est which plaintiff now seeks to recover but on the contrary it is therein expressly averred that it belonged in coparcenary to her and to her half-sisters.

Can it be maintained that a third party, a mere volunteer, can buy the claim of Mrs. Nelson, for the purpose of litigating with the other children their right under the law, to a share of their deceased mother's estate? So far as concerns the one third interest in the lot, which interest is alone involved in this proceeding in error, the purchase was a purchase of a mere of litigation; and when the purchase from Mrs. Nelson was made, the question was already in litigation.

From the case of Graham vs. Lacrosse &c R. Co., 12 Otto, 148, it appears that certain directors of the railroad had purchased real estate of the railroad company; that the company never questioned the validity of the conveyance. Three years latter, a subsequent creditor obtained judgment against the company and filed his bill to set aside this sale, as a fraud on the corporation and its creditors.

In discussing the propositions of law, involved in that case the court said: "When the question of right of a creditor to set aside a conveyance procured by fraud first came before the courts of England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and, if he did not see fit to take such proceedings, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance."

Quoting from Lord Abinger, the court said: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litiga-

tion by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice."

It must be bourne in mind that the matters and rights involved in this case are all statutory rights intimately connected with and growing out of the martial relation. The alleged "vested rights" of Bacon were rights in community property under the statute, against and in derogation of his wife's rights therein. It was a question which alone concerned the two spouses. It was a question as to their respective interests in this property. Can a stranger now IN INVITUM, after the spouses have acquiesced, now come in voluntarily and self-invited and enter into litigation with the heirs, and deprive them of the property, under pretense that constitutional rights of one of their parents were long ago invaded? This plaintiff is simply attempting to assert alleged "constitutional" rights of the husband against the wife, both long since dead.

The various territorial legislative acts referred to in the foregoing brief will be found in the Appendix to this Brief.

The defendant in error respectfully submits these motions.

CHARLES S. FOGG,
JAMES HAMILTON LEWIS,
Attorneys for the Motion.

APPENDIX.

COMMON OR COMMUNITY PROPERTY ACT OF 1873. DEFINING THE RIGHTS OF HUSBAND AND WIFE.

SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That all property, both real and personal, of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterward, by gift, bequest, devise, or descent, shall be his separate property.

Sec. 2. All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.

* * * * * * *

Sec. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate. When it shall be provided by the terms of the instrument whereby any property may have been bequeathed, devised,

or given to the wife, that the rents and profits thereof shall be applied to her sole and separate use, the entire management and control of the rents and profits of such property shall belong to the wife.

* * * * * * *

Sec. 11. In every marriage hereafter contracted in this Territory, the rights of husband and wife shall be governed by this act, unless there is a marriage contracted containing stipulations contrary thereto.

Sec. 12. The rights of husband and wife married in this Territory prior to the passage of this act, or married out of this Territory, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provision may be in conflict with the stipulations of any marriage contract.

* * * * * * *

Sec. 21. A married woman may make and execute powers of attorney for the sale, conveyance, or incumbrance, of her real or personal estate, provided her husband joins in the execution of the instrument, and the same be acknowledged and certified in the manner provided by the law for the conveyance of her real estate.

Sec. 22. Any conveyance executed under and by virtue of such power of attorney shall be executed, acknowledged and certified in the same manner as if the persons making such powers of attorney were unmarried.

Sec. 23. A married woman shall have the right to revoke such power of attorney by any revocation thereof made and executed by her, and acknowledged and certified in the manner that conveyances by married women are required to be acknowledged and certified, and it shall not

be necessary for the validity of such revocation that her husband shall join in the execution thereof.

Sec. 24. All powers of attorney heretofore made and executed by any married woman with her husband, and acknowledged and certified in the manner provided in section twenty-four of this act, and all conveyances heretofore and hereafter executed under and by virtue of such powers of attorney, and acknowledged and certified in the manner provided in section twenty-two of this act, shall be valid and binding: Provided, That no rights already vested in third persons shall be affected by anything in this section contained.

Sec. 25. This act to take effect and to be in force from and after its passage.

Approved Nov. 14, 1873.

Note: This is an exact copy of the Common or Community Property Act of 1869.

AN ACT OF 1875.

TO REGULATE THE DESCENT OF REAL ESTATE AND THE DISTRIBUTION OF PERSONAL PROPERTY.

* * * * * * *

SECTION 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor, but nothing herein contained shall be construed to conflict with laws exempt-

ing property from attachment and execution, and specially the provision securing the homestead to the survivor, and all property except (exempt) as an allowance for support of the family.

* * * * * * *

Sec. 18. This act to take effect and be in force from and after its passage.

Approved November 12, 1875.

COMMUNITY PROPERTY ACT OF 1879.

RELATING TO AND DEFINING THE PROPERTY RIGHTS OF HUSBAND AND WIFE.

SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Washington. That all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is her separate property, and all property owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.

Sec. 2. All other property acquired after marriage by either husband or wife, or both, is community property, except such as may be acquired as is provided in the first section of this act.

* * * * * * *

Sec. 7. The husband has the management and control of the community personal property with a like absolute

power of disposition—other than testamentary—as he has of his separate personal property.

Sec. 8. The husband has the management and control of the community real property, but he shall not sell, convey or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife as deeds of her separate estate are acknowledged: Provided, however, That all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases.

* * * * * * *

Sec. 12. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.

Sec. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said community property shall all pass to the survivors, subject to the community debts, and to the exclusion of collateral heirs, the family allowance and the charges and expenses of administration.

Sec. 14. The earnings of the wife are not liable for the debts of the husband.

Sec. 15. The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

Sec. 16. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

Sec. 17. The separate property of the wife is not liable for the debts of the husband, but is liable for her own debts contracted before or after marriage.

Sec. 18. No estate is allowed the husband as tenant by courtesy, upon the death of his wife, nor is any estate in dower allotted to the wife, upon the death of her husband.

Sec. 19. The property rights of husband and wife are hereafter to be governed by this act (unless there is a marriage settlement or post-nuptial agreement, as hereinafter provided, containing stipulations contrary thereto) any act to the contrary notwithstanding.

Sec. 20. All contracts for marriage settlements must be in writing and executed and acknowledged or proved, in like manner as a grant of land is required to be executed and acknowledged or proved.

* * * * * * *

Sec. 29. Nothing contained in any of the provisions of this act, or in any law of this territory, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument

in writing under their hands and seals and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the territory, and the same may at any time thereafter be altered or amended in the same manner: Provided, however that such agreement shall not derogate from the rights of creditors, nor be construed to curtail the powers of the district courts to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

Sec. 30. The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this act. This act establishes the law of this territory, respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.

Sec. 31. This act shall not be construed to operate retrospectively and any right established, accrued or accruing or any thing done prior to the time this act goes into effect shall be governed by the law in force at the time such right was established or accrued.

Sec. 32. All acts and parts of acts in any manner conflicting with the provisions of this act, or on the subject matter thereof, be and the same are hereby repealed.

Sec. 33. This act to take effect and be in force from and after its passage and approval by the governor.

Approved Nov. 14, 1879.

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No. 101.

NOV 6 1899
JAMES H. McKENNEY,
Clerk

Br. of Lewis IN THE D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899

Filed Nov. 6, 1899.

STANTON WARBURTON,
Plaintiff in Error,

vs.

ELLEN T. NELSON, MATILDA B. WHITE AND AMELIA McDONALD,
Defendants in Error.

No. ~~340.~~ 101 (6925)

BRIEF OF MATILDA B. WHITE, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

CHARLES S. FOGG,
JAS. HAMILTON LEWIS,
Attorneys for Matilda B. White, Defendant in Error.

COPELAND THE PRINTER, TACOMA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898

STANTON WARBURTON,
Plaintiff in Error,

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WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

CHARLES S. FOGG,
JAS. HAMILTON LEWIS,
Attorneys for Matilda B. White, Defendant in Error.

I.

STATEMENT OF THE CASE.

This was a suit in equity to quiet the title of the plaintiff in error to a certain lot of land in the city of Tacoma. The defendants in error filed an answer and a cross-complaint, and prayed that their title be quieted. The trial court decreed plaintiff in error to be the owner of an undivided two-thirds of the lot, and the defendant in error Matilda B. White to be the owner of the remaining one-third, and entered decree establishing and quieting titles accordingly. The essential facts and acts of the territorial legislature necessary to be considered are as follows:

1. In October, 1873, E. G. Bacon and Sophia D. Bacon were married in the State of California, and immediately thereafter, and during said month, removed to and became residents and citizens of the then Territory of Washington. Record, page 17....

At that time the act of 1871 was in force, the material parts of which were as follows:

Act of 1871.

"Sec. 12. The husband shall have the management of all the common property; but shall have no right to sell or incumber real estate except he shall be joined in the sale or encumbrance by the wife. * * *"

"Sec. 22. The common property being partnership property, the wife's share shall be one-half thereof and shall be hers and her heirs forever. * * *"

2. In November, 1873, the Territorial Legislature re-enacted the Common Property Act of 1869, and repealed the existing Act of 1871. The material parts of that act were as follows:

Act of 1873.

"Sec. 2. All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property.

"Sec. 9. The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate."

3. In 1875, the Legislature passed an Act entitled: 'An Act to Regulate the Descent of Real Estate and the Distribution of Personal property.'

Act of 1875.

"Sec. 2. Upon the death of husband or wife, the whole of the community property, subject to the community debts, shall go to the survivor."

4. In 1878, E. G. Bacon and Sophia D. Bacon, purchased and paid for, with community funds, the real property in controversy in this action. Record page 17...

5. In 1879, the Legislature passed an act entitled "An act relating to and defining the property rights of

husband and wife," Sections 12 and 13 of which are as follows:

"Sec. 12. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.

"Sec. 13. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descent equally to the legitimate issue of his, her, or their bodies."

6. In July, 1880, Sophia D. Bacon died intestate in Pierce County, Washington, leaving her surviving the said E. G. Bacon, her husband, and the three defendants in error in this action, her children, to wit: Ellen T. Nelson, the child of Mr. and Mrs. Bacon, and Matilda B. White and Amelia C. McDonald, the children of Mrs. Bacon by a former marriage. The defendant in error, Amelia C. McDonald, conveyed her interest, right, title and estate in said real estate to her co-defendant in error, Matilda B. White. Record, page 17-18

7. In 1895, the plaintiff in error obtained a judgment against E. G. Bacon, upon a cause of action arising in 1892, upon which execution was issued, and thereafter levied upon and sold the alleged right, title, and interest of said E. G. Bacon in the real property in controversy. Thereafter and in pursuance of the sheriff's sale, plaintiff in error obtained a sheriff's deed to said right, title, and interest in said real property. Record, page 17-18

8. In 1897 this present action was commenced. During the pendency of the case at bar, and after the defendant in error Ellen T. Nelson had filed her answer herein, she executed to the plaintiff in error a quit claim deed pur-

porting to convey her interest in the property in controversy. Record, page 18...

9. The contentions of the plaintiff in error were, viz:

a. That under the common property Act of 1873, E. G. Bacon became the *absolute and unqualified owner* of the *whole* of the property in controversy at the time of its purchase by Mr. and Mrs. Bacon in 1878 with community funds.

b. That also under the Act of 1875, relative to descent, upon the death of Mrs. Bacon, in 1880, Bacon took the whole estate.

c. That the act of 1879, repealing the act of 1873 and the act of 1875, impaired rights vested in Bacon by those acts.

10. The contentions of the defendants in error were, viz:

a. The act of 1873 did *not* make the husband the *sole owner* of the common property of the husband and the wife, but on the contrary the act of 1873 made the husband and wife the owners, each one half. That the act of 1879 in no wise changed the act of 1873 so far as the ownership of community real estate was concerned.

b. The act of 1875 was just what its title designated it to be, namely, an act "To *regulate* the *descent of real property* and the distribution of personal property." This act of 1875 was repealed in 1879, long prior to the death of Mrs. Bacon; the legislature had a perfect right to change the rule of descent of real property, and in so doing it did not impair any right vested, because no one has a vested right in the property of his ancestor until after the ancestor's death.

11. Among others, the trial court made the following Conclusion of Law:

"2. That the defendant, Matilda B. White, is the owner of, and entitled to a decree herein quieting her title to an undivided one-third of the property in controversy in this action, as prayed for in the amended and separate answer of the defendants Matilda B. White and Amelia McDonald herein." Record page 18-19

12. The exception of plaintiff in error to the same is as follows:

"2. Plaintiff excepts to the proposed conclusion of law numbered II. on the ground that it is contrary to the evidence and the law. On the further ground that under the laws in force at the time the property was purchased and the deed taken, E. G. Bacon was the *owner* of the property and was entitled to the succession of all the property in case of the prior death of Mrs. Bacon, and that at the death of Mrs. Bacon in 1880, Mr. Bacon was the owner in fee simple of all said property. That to give the law of 1879, entitled 'An Act Regulating and Defining the Property Rights of Husband and Wife,' approved November 14th, 1879, the construction, effect and force given by the court, to wit, that it took away from Mr. Bacon the right of succession to the whole of the property and the right to dispose of it, would be to give it a retroactive force contrary to Section 31 of said act; and to give it such a retroactive force and take away the right of survivorship in said property and take away the right to dispose of it would be contrary to Article 1, Section 10 of the Constitution of the Unitted States, in that it would *impair the obligation of the deed or contract by which Mr. Bacon acquired said property* and would deprive *said Bacon*, his sucessors and assigns, of the right

of survivorship in the property in controversy, which was a vested right under the contract or deed and the laws in force in the Territory at the time the property was acquired. Plaintiff further excepts to said conclusion on the ground that if said law is given said effect and force above mentioned, it would be *depriving Mr. Bacon, his successors and assigns, of property without due process of law*, and contrary to and in contravention of Article 14 of the Constitution of the United States, and plaintiff claims the protection of both said provision of the Constitution of the United States." Record, Page 19-20

13. Upon the appeal of this case to the supreme court of the State of Washington, that court affirmed the judgment of the court below, (Warburton v. White, 18 Wash. 511), saying:

"Per Curiam.—The question to be determined in this case is whether the husband succeeds to all the property which was purchased by himself and wife with community funds in this state (then a territory) in 1878, or whether one-half of said property descends to the heirs of the wife. It is contended by the appellant that the property descends to the husband by right of survivorship under the laws of 1873 and 1875 (Laws 1873, p. 450; Laws 1875, p. 53) and a very painstaking and exhaustive brief has been filed in support of this contention. As an original proposition the brief and argument of appellant would be exceedingly interesting, but the *uniform* holding of this court for the last *fifteen years* has been to the contrary. This question was first decided adversely to appellant's contention in Holyoke vs. Jackson, 3 Wash. T. 235 (3 Pac. 841), in the year 1882. The same question has been expressly decided by this court in Hill v. Young, 7 Wash. 33 (34 Pac. 144), and Mabie v. Whittaker, 10 Wash. 656 (39 Pac. 172), *and incidentally decided in probably forty other cases* so that the rule announced by these cases has become the *established rule of law and of property in this state.* * * *

14. In denying a petition for a rehearing, the court said:

"Per Curiam.—This cause is before us on a petition for a rehearing, appellant asking a further consideration of the question before urged by him in his brief and on the oral argument, that the right of survivorship granted under the law of 1875, and the rights urged under the law of 1873 were vested, proprietary and contractual rights, and that, therefore, later acts of the legislature could not deprive appellant of them, on the ground that it would impair the obligation of the contract by which the property was obtained, and thus be in conflict with the constitution of the United States. If any of these questions are presented by the record it is sufficient to say that *the court* was and *is of the opinion that Section 2 of the act, Laws 1875, p. 53, was never in force to the extent of confering a vested right of survivorship* in favor of either spouse as to community property. As such it would have been *void as not being embraced in the title of the act,* and at most it could only be construed as a statute regulating the *descent* of property, and it was within the power of the legislature to change it, which was thereafter done. We were of the opinion, also, that, even though it conferred a right to property by survivorship, it could be taken away, and was, by subsequent legislation, and that under the laws of 1873 no vested rights were conferred upon the husband as claimed, but that the same were within the power of the legislature to change thereafter, as was done. *Rights, such as are claimed by plaintiff, never were recognized or enforced here either during territorial days or since, under either of said acts; but the uniform holdings have been to the contrary,* as stated in the former opinion.

II.

ARGUMENT.

Plaintiff in error bases his claim that this court has

jurisdiction of this cause upon his exception to the conclusion of law above set out, and upon the theory, *first*, that there has been an impairment of the obligation of the *alleged contract* or grant under which Mr. and Mrs. Bacon acquired the property in controversy; *second*, that there has been a taking of property without due process of law.

FIRST.

The alleged impairment is based upon the ground:

1. That upon the purchase of this property in 1878, Mr. Bacon *eo instanti* became the absolute and sole owner under the act of 1873; and

2. If he did not become the sole owner under the act of 1873, that under the act of 1875 he became the sole owner as survivor upon the death of Mrs. Bacon in 1880; and

3. That the Act of 1879, repealing the Acts of 1873 and 1875, provided that one-half of the community property should go to the heirs or devisees of the deceased spouse, and to that extent took away from Bacon property conferred upon him by the conveyance of his grantor and the acts of 1873 and 1875.

A.

The obvious fallacy of the position of plaintiff in error lies in the fact that the supreme court of Washington has many times decided that the act of 1873 *does not* give

the husband the *sole* ownership of community or common property, but *does* give him a one-half interest *only* and the wife the other half. The act of 1879 makes no change in this regard, as under that act the husband and wife each own one-half *precisely as under the act of 1873.* Hence no rights of ownership of Mr. Bacon accruing to him under the law of 1873, whether vested or otherwise, were impaired by the act of 1879. The *ownership of the property was the same under both acts.* This has been settled by many decisions of the Territory and state supreme court.

These statutes had been enacted and this interpretation placed upon them by the supreme court of the Territory and State of Washington *many years before plaintiff in error purchased this lot at Sheriff's sale in 1896.*

"The rule announced by these cases has become the established rule of law and of property in this state. Rights have been established and have grown up under these decisions which it would be wrong now to disturb."

Warburton v. White, 18 Wash. 511.

This construction was placed on these legislative acts by the judiciary ten years before plaintiff made his loan to Bacon, thirteen years before he recovered judgment, and fourteen years before he purchased this property at sheriff's sale.

The following decisions of the supreme court of the state of Washington show beyond question or argument, that plaintiff in error is *attempting to place a construction on the acts of 1873 and 1875 utterly at variance from the construction of that court, and upon this erroneous construction rests*

plaintiff in error's sole ground for claiming that this court has any jurisdiction or upon which to predicate his claim of error on the part of the court below.

In 1882, in the case of Holyoke vs. Jackson, 3 Wash. Ter. 235, it was held: "In it (the community) the proprietary interests of husband and wife are equal. * * * By virtue of the statute, this husband and wife creature acquires property. * * * To somebody it must go in case of death or divorce. * * * That the like absolute power of disposition as of his own separate estate, bestowed by the 9th Section of the act of 1873, was a *mere trust* conferred upon him as a member and head of the community, *in trust for* the community, *and not a proprietary right.* It was perfectly competent *for the Legislature of 1879 to take it from him and assign it to himself and his wife conjointly.* That was done. When, therefore, in 1880 the plaintiff in error, without his wife, entered into an agreement to sell the land in question, he agreed to do what he himself, by himself, could not do, and therefore could not agree to do. To make an actual sale or conveyance without his wife he had no power. The law says such a thing shall not be done. An agreement proposing it is in conflict with the law and void.

"Community property was created by the statute of December 2, 1869. Although called common property by that statute and by the statute of 1873, by the statute of 1879 it was first denominated community property. The rights referred to in the 31st section of the act of 1879 are proprietary rights and not such naked power of management, control or disposition as are devolved upon any married persons to be exercised in trust for the community. Therefore all the provisions of the act of 1879 which operate to create, vary or assign powers of that description, are

applicable to the property previously acquired. By the statute of 1879, section 8, the husband is clothed with a certain trust in respect to community real property. The management and control of it is vested in him, not for himself but for the community. Besides this, he, with the wife, is endowed with power to dispose of it. This power, too, is in trust for the community. For we must distinguish the community called into existence by the statute from the two individuals who compose it. By a like distinction, a corporation is conceived to differ from its stockholders. When the husband, therefore, thus situated, undertakes to dispose of the community property as his own, he stands differently from the absolute proprietor of a homestead, who has the power to shift the domicile of his family at pleasure, and who is required to have his wife join, not because she is joint trustee with him, nor because he without her is not owner, but merely as a check on his power of disposition, lest certain consequences follow, injurious to the proper policy of the state. In the matter of disposing of community property, husband and wife are, by the law of 1879, joint trustees for their mutual benefit in the community. Within the scope of their joint trust, neither can act without the other."

This case makes plain the fact that under the common property act of 1873 the *husband and wife* were the *owners* of common or community property, *and not the husband alone* as now contended by the plaintiff in error. The only difference, between the rights conferred upon the husband and wife in relation to community real estate under the act of 1871 and under the act of 1873, was that under the act of 1873 a power to sell and convey community real estate was conferred upon the husband *in trust* for the community. This *power to sell and convey*, so given the husband, in no

wise concerned or affected the *egual ownership* of the husband and wife in the common or community property.

During the last fifteen years, this case of Holyoke vs. Jackson has been repeatedly cited and followed by the courts in the state of Washington, as bear witness the numerous cases decided by the supreme court of that state in which the case is cited, approved and followed.

In 1893 the supreme court of Washington again had occasion to consider the principle involved in this case, and in Hill vs Young, 7 Wash. 33, said:

"The land in controversy was acquired in 1871, being conveyed to the husband by deed of purchase. The act of 1869, 'defining the rights of husband and wife,' declared that property acquired by either husband or wife, except that acquired by gift, bequest, devise or descent, should be 'common property.' It also provided that the husband should have the same absolute power of disposal of the common property as he had of his separate estate. Defendants in error maintain that this power to dispose was a vested right in the husband, which could not be taken away by any subsequent statute. But it is not necessary to decide this point; the act of 1869 having declared certain property 'common property,' did not make provision for the disposal of such property upon the death of either spouse, as was done by later laws on the same subject; but we think that without anything further than was contained in that act, courts of the territory would have been bound to administer upon such property, after the death of husband or wife, according to the established rules of those states and countries where common or community laws had existed. The first and cardinal of such rules was that the *community* was *dissolved* by the *death* of either spouse; next, the *right* of *disposal* in either spouse was *ended;* and, third,

the property became vested by moieties in the surviving spouse and the children. Therefore, upon the death of Mrs. Hill, in 1883, even if the act of 1869 was the only law applicable to this land, the *right* of the *husband* to dispose of the the *whole estate terminated.* And it may be further stated that the purchaser in this instance knew of the marriage relation which existed between his grantor and Mrs. Hill and knew, also, that appellant was their only child."

The common property acts of 1869 and 1873 are identical.

Again, in 1895, the supreme court of Washington had occasion to re-examine and consider every question that is raised upon the record in the case at bar, and therein decided each of these questions adversely and contrary to the contention of plaintiff in error. We refer to the case of Mabie vs. Whittaker, 10 Wash. 656. The decision itself bears evidence that the subject matter under consideration received the careful, deliberate and exhaustive consideration of the court. In that case, among other things, the court decided:

"Real property acquired by the community under the provisions of the law of 1869, which gave the husband power to convey the entire title by his separate deed, could not be conveyed away by the husband after his wife's death, so as to pass her interest, while the law of 1871 (Laws —p. 73, §22), declaring that one-half the community property should belong to the wife and her heirs forever, was in force.

"The deed from Tilley and wife to Andrew Mabie was executed while the statutes of 1869, relating to common property, were in force, and the land became the common property of Mabie and wife thereunder. Section 9 of this act (Laws, p. 320, Abb. Real Stat. p. 472), empowered the

husband to convey the entire title to such land by his separate deed, but subsequently the legislature passed another act (Laws 1871, p. 70, Abb. Real Prop. Stat. 476), which was in force at the time Mrs. Mabie died in 1872, and §12 of the act reads as follows:

" 'The husband shall have the management of all the common property, but shall have no right to sell or encumber real estate except he shall be joined in the sale or encumbrance by the wife; but he may sell or encumber any personal common property without being joined by the wife.'

"One of the contentions of the respondents is that whatever the nature of the wife's interest in the land was, the right of Mabie to convey the entire title could not be taken away by legislation subsequent to the time it was acquired by him. But leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title under the former law after her death and cut off her heirs, *we think the subsequent act took away his power to do so.* It was immaterial whether the record title to the community lands stood in the name of the husband or of the wife, or of them both, when considered with reference to the power of the legislature to authorize either of them to convey. The legislature could as well have provided that the wife could convey as the husband, and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less.

"Furthermore, prior to the conveyance to Hallett the community in question had been dissolved by the death of the

wife, and at the *time* of her *death* the *law of 1871*, relative to the *descent* of community property, *was in force*. Sec. 22, p. 73 (Abb. Real Prop. Stat. p. 478) provided that: "The common property being partnership property, the wife's share shall be one-half thereof and shall be her's and her heirs forever; and her share of the common property may be increased so as to be more than one-half, by the wife's compliance with the provisions of section five of this act.

"The statute of 1871 did not undertake to divest any right which had became vested. Mabie receiving this conveyance under the act of 1869 thereby became the owner of an undivided one-half interest in the land, and his wife thereby became the owner of the other half. *Her right was as much a vested right as his.* Upon the weigth of authority the legislature had power to change the law of descent and could take away the right of survivorship as to estates in joint tenancy, and make the same applicable to lands already acquired. Cooley Const. Lim. (5th ed.) 440-41. Freeman, Cotenancy and Part. §36 and cases cited by each; also Miller vs. Demett, 6 N. H. 190. Section 22 aforesaid is substantially a statute of descent. It has the technical and apt words of such a statute: 'Hers and her heirs forever,' which indicates the legislative intent. There was also a general statute of descent in force which could more logically be applied to community estates than could the doctrine of joint tenancy. Laws 1862, p. 261; Abb. Real Prop. Stat. 375-378.

"Subsequently another act was passed to regulate the *descent* of real property. Laws 1875, p. 55, Sec. 2, Provided: 'Upon the death of husband or wife the whole of the community property, subject to the community debts, shall go to the survivor.' This statute con-

tinued in force until November, 1879, when an act was passed (Laws 1879, p. 77), §13 of which was as follows:

"In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall pass to the survivor subject to the community debts, and to the exclusion of collateral heirs, the family allowance and the charges and expenses of administration.

"In neither of these acts were community lands referred to as being held in joint tenancy, and the only reference of the kind thereto is contained in the act aforesaid, passed in 1885, subsequent to all of them.

"We cannot overturn the statutes, nor the settled law of the state to meet the hardships of a particular case, much as we would like to avert them. If Andrew Mabie could not convey this land during the life time of his wife, he could convey nothing more than his interest therein after her death. Upon her death her interest in these lands vested in her heirs."

And lastly in the case at bar, (Warburton vs. White 18 Wash. Rep. 511), the rule announced in these decisions is again affirmed.

Thus it is apparent that, under the construction placed on the acts of 1873 and 1875 by the Supreme Court of the Territory and State, Bacon was *not* the sole owner of the community property, as contended by plaintiff in error.

If it were true that the obligations of the contract
grant by which Mr. and Mrs. Bacon acquired the pro-
rty were impaired by the Act of 1879, this court woul
unable to consider the objection, for the alleged
NTRACT, the obligations of which plaintiff in error
aims have been impaired, IS NOT IN THE RECORD, nor ar
y of its terms, provisions, or obligations in any wi

B.

Again, were the constructions thus placed upon the the acts of 1873 and 1875 open for review here, the contention of plaintiff in error that the obligation of Bacon's contract of purchase was impaired by the act of 1879, in that the act divested Bacon of a one-half interest in the community property and bestowed it upon the heirs of Mrs. Bacon, is still obviously fallacious. Plaintiff in error does not contend that the property, or any interest therein, was turned back to Bacon's grantor, or that Bacon's grantor was relieved of any obligation assumed by him in the contract of conveyance. He contends merely that the act of 1879 takes one-half of the property from Bacon and bestows it upon the heirs of Mrs. Bacon. These heirs were not parties to the contract, nor were they in privity with Bacon's grantor. Neither Bacon's grantor nor any person claiming under him is a party to this present action, nor, so far as appears, claims any interest in the property. This may be a taking of Bacon's property without due process of law, but it certainly is not an impairment of the obligation of the contract of purchase.

The contentions of both plaintiff and defendant in error assume that the contract of conveyance was, and remains, valid and effectual to pass all the interest of Bacon's grantor. Both parties assume that the obligation of that contract has not been impaired. The whole contention is as to the rights of grantees among themselves.

C.

Again. The plaintiff in error is attempting to assert, not that his own rights have been impaired or taken by the

Act of 1879, but that the property of one Bacon was affected by the law of 1879. The provisions of the Constitution invoked cannot be made use of by this plaintiff. What he purchased at the sheriff's sale of Bacon's right, title, and interest, in said real property was Bacon's right, title and interest in said property as it stood under the laws of the state at the time of the sale. At that time, there was in force as law an Act of the Territorial Legislature, approved November 14, 1879, to the effect that upon the death of either spouse one-half of the common property should go to survivor, and the other half should be subject to the testamentary disposition of the deceased spouse, and that if such spouse should die intestate, his or her one-half interest should descend to his or her legitimate issue. The highest Courts of the territory and state have held again and again since 1882 that the Act of 1879 applies to all community property whether it was acquired before or whether it was acquired after the passage of Act of 1879. That act, has never been declared to be unconstitutional, and has been enforced repeatedly by the courts of this State as first construed. If the law of 1879 impaired the obligation of Bacon's contract of purchase of this land, *Bacon, and Bacon only, can complain.*

It is therefore believed that this plaintiff cannot call in question the effect of the law of 1879 upon Bacon's contract of purchase, since this plaintiff has not shown, and does not claim, that any of *his contracts* have been impared by the law of 1879.

SECOND.

The plaintiff in error has further objected that the act of 1879 deprived Bacon of his property without due process

of law, contrary to the fourteenth amendment to the federal constitution. Plaintiff does not complain that the act of 1879 deprives *him* of any property. Bacon not being a party to this suit, it is understood that the effect of the law of 1879 upon his rights or property cannot be inquired into in this case.

A.

But if it be granted that the plaintiff is in a position to assert Bacon's rights as regards the law of 1879, this court should affirm the decision of the court below for the reason that no property of any one was taken by the law of 1879. No question about the power of the legislature of the territory to take the property of any person was involved in the disposition of the case below. The whole effect of the decision of the court below in the case at bar was that neither Bacon nor this plaintiff in error ever had the property which the plaintiff in error claims was taken from Bacon.

The decision is that the laws of 1873 and 1875 did not give to Bacon the whole of the community. Those laws gave to the husband only certain powers of management and of disposition over the community property during the existence of the marriage, which powers of disposition were never exercised by Mr. Bacon. The law of 1875 pointed out the husband as the person to whom should go the one-half interest of the wife in the community property when she should die, designating him as her heir at law. The law of 1879 changed the direction the wife's interest should take upon her death. It made her legitimate issue her heirs at law. Neither act made Bacon the owner of the community property. The decision of the court below is that

he never had the property claimed. Consequently the law of 1879 did not take it away from him.

While the plaintiff in error attempted to bring into question the validity of the law of 1879, the decision of the court proceeded on the ground that the plaintiff did not not have the property he claimed as the fundation of his case, and so it was unnecessary for the court to consider the validity of the law of 1879 so far as a taking of property was concerned. According to the decision of the court the interest of the respective spouses in the community property is a one-half interest under the law of 1879 and all prior community property acts of the territory. The only provision of the act of 1879 to which effect was given by the state court was that section which prescribed a rule of descent of community real property.

The decision would have been, in all other respects, the same as it was had the Act of 1879 never been passed and the Acts of 1873 and 1875 remained unaltered. The decision was that the legitimate issue of Mrs. Bacon should take her half of the community real property as her heir at law under the Act of 1879, in the place of her husband, as provided by the Act of 1875. In thus holding that the Act of 1879 governed in this case the Court treated the Act of 1875 as an act of descent only, just as it treated the Act of 1879, so far as it applied that act to this case, and held that if the Act of 1875 attempted to do anything more than prescribe a rule of descent, to this extent the act would be in conflict with that clause of the Act of Congress establishing the Territorial Government of Washington providing that "To avoid improper influences which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one subject and that subject shall be expressed in the title" (approved March 2, 1853); Revised Statutes §1924.

B.

The contention of plaintiff in error is based upon a construction of the acts of 1873 and 1875 contrary to the construction placed thereon by the territorial and state courts. The court has repeatedly held that the power of management and of disposal conferred upon the husband by the act of 1873 was a mere power to be exercised by him as the agent or trustee of the community, of which he was a member; and that the act of 1875 was merely an act of descent.

Plaintiff in error contends that the powers given the husband by the act of 1873 were proprietary rights, and, taken in connection with the act of 1875, constituted him the owner of the property. These acts having been in force when the property was acquired, the territorial and state court was competent to construe those acts, and the construction put upon those acts by the territorial and state courts is conclusive. After the passage of an act by a state legislature and before it has been construed by the highest court of the state, any person as well as any court, federal or state, is at liberty to interpret the act according to his or its views. But such construction is not binding upon the court of last resort in the state. When the question comes before that court it is at liberty to place a different construction upon it, and thereafter such construction will be conclusive and binding on all.

It is useless to consult the commentaries or decisions of France, Spain, or Mexico, or the decisions of Louisiana, Texas, or California, in order to ascertain the true construction of a statute of Washington which has been fully construed by the highest court of that state.

Although were the matter *res novo* it might appear that the acts of 1873 and 1875 were susceptible of the interpre-

tation contended for by the plaintiff in error, yet the court whose peculiar function it is to place a final interpretation upon those acts took a different view. An argument which has for its basis an interpretation of those acts contrary to the one thus placed upon them by the supreme court of the territory and state is plainly entitled to no consideration.

C.

But if this court should consider itself at liberty to disregard the construction of the state court a careful consideration of the Acts of 1873 and 1875 will convince this court that those Acts are not susceptible of the construction contended for by the plaintiff in error.

The Act of 1873 reads as follows:

"Sec. 2. All property acquired after the marriage by either husband and wife, except such as may be acquired by gift, bequest, devise or descent shall be *common property.*

"Sec. 9. The husband shall have the entire *management and control of the common property,* with the like absolute power of disposal as of his own separate estate. * * *"

It will be observed that the act in words recognizes the fact that the wife is part owner of the property, and that it was because the wife was part owner of the property that it became necessary for the legislature to designate which of the two common owners should have the management and control of the property and the power to execute a conveyance thereof. It is obvious that this power of control and of transfer was placed in the husband merely from considerations of convenience. By the terms of the act, the proceeds of any sale made by the husband would be common property. The expression used in this act by the

legislature—*common* property—negatives the idea that the legislature intended to make the husband the sole owner of the property.

The Act of 1875 is entitled "An act to regulate the descent of real estate and the distribution of personal property." It is to be observed that the act applies to all property. The section of the act touching the descent of community real property is as follows: "SEC. 2. Upon the death of the husband or wife, the whole of the *community* property, subject to community debts, shall go to the survivor. * * *"

This act also is utterly inconsistent with the idea that either spouse was the owner of the whole of the community property, because the act assumes that at the time it was passed both the husband and the wife were the owners. If the husband were the absolute owner, he would have a right to dispose of the property by will; but the language of the statute is imperative that the community property "*shall* go to the survivor," thus making it impossible for the spouse dying first to devise or bequeath any part of it. By force of the act, the whole of the community property descends to the surviving spouse. If the surviving spouse takes the common property by descent, it necessarily follows that such surviving spouse was not previously the absolute owner thereof. The fact that the act of 1875 provides that the surviving spouse, whether husband or wife, shall take the whole of the community property, conclusively shows that the legislature did not regard either spouse as the absolute owner prior to such survivorship.

D.

The decision of the court below is to the effect that neither Bacon nor the plaintiff ever had the property claimed

by the plaintiff in error. The decision is further that, in altering the rules of descent, which was the only effect the court gave to the act of 1879, the legislature did not violate the constitutional inhibition against taking property without due process of law. This court as has been shown above, must come to a like conclusion in regard to the effect of the acts of 1873 and 1875, if it finds itself at liberty to place its own construction upon those statutes.

E.

If the act of 1879 deprived E. G. Bacon of any part of this property, either with or without due process of law, the *plaintiff in error* cannot complain. If any part of this lot was taken from E. G. Bacon in 1879 and given to another, it necessarily follows that thereafter the right or interest of E. G. Bacon in and to the property was only such as was left after such part had been taken. When plaintiff in error, in 1896, purchased at execution sale the right, title and interest of E. G. Bacon in and to this lot, he purchased only such right, title, and interest in and to the lot as remained in Bacon after the act of 1879. The sheriff did not pretend to sell to plaintiff in error a right to bring suit against the heirs of Mrs. Bacon for the purpose of having the act of 1879 declared unconstitutional, and to recover the one-half interest taken from E. G. Bacon by the act of 1879 and bestowed upon these heirs. It is very doubtful whether such right is in its nature assignable by act of the party; it is certain that it is not such a right as can be sold on execution. If the act of 1879 took any property from E. G. Bacon, E. G. Bacon ceased to be the owner of that property at that time, and plaintiff in error merely purchased such portion of the property as remained in E. G.

Bacon. Nor can this conclusion be evaded by the claim that *effect* was first given to the act of 1879 by the decision of the trial court. The parties concerned had given it effect. Otherwise there could have been no occasion for bringing this suit.

THIRD.

The only thing that remains to be considered is the constitutionality of the decision of the court below so far as it upheld the act of 1879 in changing the course of descent of community real property. It has always and everywhere been held competent for the legislature to alter the *rules of descent*, and that the heir of a deceased person takes according to the law in force at the time of the death of the ancestor. The rule that no one can have a vested right in the estate of his ancestor prior to such ancestor's death, has been too long and too well established now to be open for discussion.

FOURTH.

PROPERTY RIGHTS OF HUSBAND AND WIFE.

The statutes which the court is asked to construe deal solely with the property rights of husband and wife. The marriage relation and the property rights arising therefrom, are not governed by the ordinary rules of private contract.

From the case of Neilson vs. Kilgore, 145 U. S. 487, it appears that Scruggs and wife resided upon the lands of

Mrs. Scruggs, in Tennessee. The laws of that state provided that the husband should have the rents and profits of his wife's land. In 1876, while the law thus stood, a creditor recovered judgment against the husband. In 1879, the legislature passed a law exempting the rents and profits of the wife's land from liability for the husbands debts. Some years later the judgment creditor levied execution upon three heifers and one steer pasturing upon the wife's land, as the property of Scruggs, and Mrs. Scruggs thereupon replevined them from the purchaser at execution sale. The case was appealed and finally brought to this court, plaintiff in error claiming that the act of 1879 impaired the obligation of the contract between Scruggs and his creditor. This court in its decision by Mr. Justice Harlan, said:

"Marriage is a civil institution, a status, in reference to which Mr. Bishop has well said, 'Public interests overshadow private–one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments.' 1: Bish. Marriage, Divorce, and Sep. §5. The relation of husband and wife is, therefore, formed subject to the power of the State to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference.

"If the Act of 1879 did not infringe any vested right of a husband, *much less did it infringe any right belonging to his creditors.* The views we have expressed are supported by the judgment of the Supreme Court of Tennessee in Taylor vs. Taylor, 12 Lea, 486, 498, where it was held that the acts of 1849 and 1879, above referred to, were enacted for the benefit of married women, not of their husbands,

and that a husband has no vested right to the future profits of his wife's land that prevents the enactment of such a statute as that of 1879."

The facts and the contentions in Noel vs. Ewing, 9 Ind. 37, were substantially the same as in this case. The parties to the action called in question the validity of state legislation increasing the rights of a widow in the real estate of her husband, and giving her a fee simple title to one-third of the real property of which he died seized, instead of a life estate in one-third thereof. The court uses the following language concerning legislative control over the property rights arising out of the marriage relation:

"Hence, as between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate. The sovereign power may, by general enactment regulate and mould their relative rights and duties at pleasure, and the statute in force at the dissolution of the marriage by death is the measure of the survivor's rights."

The changes made by the legislature of Washington in the law governing the property rights of husband and wife as between themselves have their counterpart in the early legislation of many other states.

See Noel vs. Ewing supra.

In the case just cited the court, after reviewing the statutes enacted in rapid succession by the legislature of Indiana, continues: "In the numerous changes just alluded to, sometimes against the wife, sometimes in her favor, is it not remarkable that neither the bench, nor the bar, nor

the people, dreamed that the legislature was transcending its powers? No one thought of going back a quarter of a century to find when this piece of property or that was acquired, or what were the rights of the wife under the law then in force, with a view to arrest the additional allowance made to her out of her husband's estate. All conceded the competence of the legislature to enlarge her rights, and acquiesced in its exercise."

FIFTH.

THE SPRECKLES CASE.

In the lower court, plaintiff in error rested his contention largely on the case of Spreckles against Spreckles, decided by the Supreme Court of California, (116 Calif. 339), notwithstanding that the doctrine laid down in that case has been expressly again and again repudiated by the Supreme Court of Washington in construing the laws of the State of Washington. If it were material it would be easy to show that the Spreckles case is not harmonious, even with many other decisions of the California Supreme Court during the last forty years. The case at bar, however, is clearly distinguishable from the Spreckles case in its facts and in the law applicable thereto. From the facts and law as announced in the Spreckles case, it appears that that case relates to the *power* of the husband to sell community property *while both husband and wife are alive*, and while the community exists.

In the case at bar, Sec. 9 of the Washington act of 1873 gives to the husband the *power of disposition* of com-

mon property, but this grant of power and authority *only obtains* and continues during the *existence* of the community; as soon as the community is *dissolved* for any reason, and, as in the case at bar, by the death of the wife, the power and authority of the husband under Sec. 9 *instantly terminates*. The reason of this rule is manifest, especially so where, as in the case at bar the wife leaves children, legitimate issue of her body, not the children of the surviving husband. This power was never exercised by Mr. Bacon.

The death of Mrs. Bacon *dissolved the community*, and thereby *eo instanti* terminated all *power* of the husband to dispose of the property of the late community.

Hill vs. Young, 7 Wash. 33.

Mabie vs. Whittaker, 10 Wash. 656.

Sadler vs. Neisz, 5 Wash. 182.

Holyoke vs. Jackson, 3 Wash. Ter. 235.

Ballinger on Com. Prop. §222, Et Seq. and cases cited.

In the Spreckles case the court was dealing with an existing community; the husband and wife were then both alive and both in court asking affirmative relief; there had been no dissolution of the community. In that case the legislature had attempted to curtail the power of the husband to *dispose of community personal property during the existence of the community.* The case holds that because the legislature had previously granted to the husband full

power to dispose of community property, that he thereby *acquired a right to dispose of the property during the existence of the community*, where the husband and wife were *married* and had acquired the commuuity property while this law was in force. That in *such case* the legislature could not curtail the *power of disposal* of such property during the *existence* of the *community*. Beyond this the Spreckles case does not and could not go, under the law and the facts of that case. In the case at bar, *no such question arises*. The husband has never exercised that power; he has made no *disposition* of *the community property*. The wife died while the property in controversy remained the property of the community. The property remained intact and undisposed of up to the moment the community was dissolved by the death of the wife, and at that instant and because of that dissolution, the power of the husband to dispose of this community property forever ceased, so far as the wife's half was concerned, even if the power existed up to that time. But no such power existed at the time of her death, for the prior act of 1879 had divested the husband of any and all such power and authority. But if it be conceded, for the sake of the argument, that *before her death*, he had that right, *the moment after* he did *not* have it, for the reason that the community for which he was authorized to act *had then ceased to exist*, and the act gave him power to act only for the *living persons*, comprising the community. *He had no warrant or authority to act for the dead.* The instant of the wife's death her half of the community property, subject to community debts, *descended to or by statute was cast upon her heirs*. The surviving husband had no warrant or power to act for these heirs. Hence the husband's power and authority *terminated in any event*, upon the death of Mrs. Bacon in 1880. And this is the case under the act of 1873 as well as the act of 1879.

An examination of the decision in the Spreckles case will also show that it was based largely upon §679 of the civil code of California which provides that "the ownership of property is absolute when a single person has the sole dominion over it." The section of the code of that State which provides that the husband has the management and control of the community property with the like absolute power of disposal as he has of his separate estate taken in connection with §679 makes the husband the absolute owner of the community property during the existance of the marriage relation. No such statute of Washington has been referred to nor ever existed in the Territory or State of Washington.

The questions at issue in that case are easily distinguishable from the questions in this case. We may concede that the act of the Territory of Washington of 1879 could not deprive the husband of the power of management and disposition given him by the act of 1873 so long as the community existed which would be in substance the holding and the only holding of the court in the Spreckles case; but plaintiff's case here is not based, nor does he predicate any right upon a repeal of the *power of management and disposition* of E. G. Bacon under the law of 1873.

SIXTH.

CONCLUSION.

We have now answered each and every contention made by the plaintiff in error in either the trial or the supreme court of the State. We believe that we have shown

that the act of 1879 did not impair the obligation of the contract of purchase whereby Bacon and his wife acquired the property, and that it did not deprive Bacon or his successor of any property. The act of 1879, so far as it affected the property in controversy, and so far as effect was given to it by the court below, was an act entirely within the power of the legislature to pass. We have not seen the brief of the plaintiff in error, and therefore, do not know the points which he may attempt to urge in this court as ground for reversal of the decision of the state court. But we understand the rule to be that only those objections urged in the court below are available in this court.

Respectfully Submitted,

CHARLES S. FOGG,

JAS. HAMILTON LEWIS,

Attorneys for Defendant in Error,
Matilda B. White.